Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

(3)

No. 86-150
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

LEE FENENDAEL and GLORIA FENENDAEL, his wife,

Defendants-Appellants.

v.

LILLIAN ZOBEL, by Herbert Z. Hancox and Helen W. Hancox, her guardians,

Plaintiff-Appellee,

On appeal from the Wisconsin Court of Appeals, District II, following a denial of review of the Wisconsin Supreme Court

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MOTION TO AFFIRM AND APPENDIX

David Colwin

COLWIN, FORTUNE, COLWIN,
POMEROY & ENGLISH, S.C.
201 South Marr Street
P.O. Box 1476
Fond du Lac, WI 54935
(414) 921-5770

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MOTION TO AFFIRM, OR IN THE ALTERNATIVE, MOTION TO DISMISS

The plaintiff-appellee hereby moves the United States Supreme Court for an order affirming the Order of the Wisconsin Supreme Court denying the defendants-appellants' Petition for Review, or in the alternative, for an order dismissing the appeal of the defendants-appellants pursuant to United States Supreme Court Rule 16, 28 U.S.C., on the grounds that:

1. The United States Supreme Court does not have jurisdiction pursuant to 28 U.S.C. 1257(2) or (3) inasmuch as the defendants-appellants have failed to explicitly and timely raise the constitutional issue set forth in the Jurisdictional Statement.

2. The Wisconsin Court of Appeals' Decision rests upon an adequate non-federal basis.

3. The defendants-appellants do not have standing to raise the constitutional issue set forth in the Jurisdictional Statement.

STATEMENT OF FACTS

On December 20, 1979, Lillian Zobel sold her house on a land contract to the Fenendaels. In November, 1981, Miss Zobel petitioned the Circuit Court for the appointment of a conservator of her estate. The conservatorship court appointed the Hancoxes as conservators of Miss Zobel's estate. After the appointment of the Hancoxes, Miss Zobel allegedly decided that she wanted to forgive the balance of the land contract and gift her house to Gloria Fenendael. In March, 1982, Miss Zobel executed a deed to Gloria Fenendael in satisfaction of the balance of the land contract. She did not inform the Hancoxes or the

conservatorship court of the transaction nor seek their approval of the gift (42/35, 340).

Shortly thereafter, Dr. Darold A. Treffert, a Fond du Lac psychiatrist, was appointed by the court to conduct a psychiatric evaluation for the purpose of determining whether Lillian Zobel was competent to enter into the real estate transaction on March 9, 1982 (42/44). Dr. Treffert conducted the evaluation on May 25, 1982, and concluded that Miss Zobel was not competent to understand the transaction (42/53, 49).

After receiving Dr. Treffert's report, Mr. and Mrs. Hancox petitioned the court for a guardianship for Miss Zobel, and on July 20, 1982, they were appointed guardians. At no time was the gift of the balance of the land contract approved by either the conservators or the conservatorship court (42/340).

This action was brought for the purpose of having the gift declared void. The case was tried before a jury in March, 1984, and the jury returned a verdict finding that Lillian Zobel was competent at the time she executed the deed in March, 1982.

During the course of the trial, the trial court judicially noticed the conservatorship and guardianship files regarding Zobel (42/382). The record reveals that the conservatorship was referred to by the Hancoxes or the Fenendaels on 17 occasions before the Fenendaels objected on the relevancy and pleading grounds asserted on this appeal (App. 1:9).

At the close of the plaintiffs' case and at the close of the evidence, the Hancoxes requested that they be allowed to amend their pleadings for judgment as a matter of law on the ground that the

deed was void inasmuch as it was not approved by the conservators or the conservatorship court (42/383-384, 388, 391, 467-468). The court rendered a written decision on Motions After Verdict on May 23, 1984, in which it denied the Hancoxes' motions to amend the Complaint and for judgment notwithstanding the verdict.

The plaintiff-appellee appealed the trial court's Judgment to the Wisconsin Court of Appeals. The Court of Appeals rendered a decision on November 20, 1985, reversing the trial court's Decision and directing judgment in favor of the plaintiff holding that a conservatee:

> "...requires the approval of either the conservator or the conservatorship court in order to make an effective gift of her property." (App. 1:17)

The defendants-appellants thereafter petitioned the Wisconsin Supreme Court

for review of the Decision of the Court of Appeals. The Supreme Court denied the Petition on April 8, 1986 (App. 3:1).

ARGUMENT

A. THE UNITED STATES SUPREME COURT DOES NOT HAVE JURISDICTION PURSUANT TO 28 U.S.C. 1257 (2) or (3) INASMUCH AS DEFENDANTS-APPELLANTS HAVE FAILED TO EXPLICITLY AND TIMELY RAISE THE CONSTITUTIONAL ISSUE SET FORTH IN THE JURISDICTIONAL STATEMENT.

The defendants-appellants claim the Wisconsin Court of Appeals' interpretation of §880.31, Wis. Stats., is repugnant to Section One of the Fourteenth Amendment to the federal Constitution, and Article One, Section One of the Wisconsin Constitution. Defendants-appellants assert jurisdiction pursuant to 28 U.S.C. 1257(2) and (3) and 28 U.S.C. 2106.

It has long been settled that in order for the United States Supreme Court to have jurisdiction on appeal or on petition for certiorari, the appellant must have explicitly and timely challenged the constitutionality of a state statute. In Raley v. State of Ohio, (1959) 360 U.S. 423, 79 S.Ct.1257, 3 L.Ed.2d 1344, the Supreme Court stated the following:

> "It is essential to our jurisdiction on appeal that there be an explicit and timely insistence in the state courts that a state's statute, as applied, is repugnant to the federal Constitution, treaties or laws."

Similarly, it is also true that when a state court fails to rule on a federal question, it is assumed that the appellant did not properly present the issue in the state court. In Fuller v. State of Oregon, (1974) 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642, the court stated:

> "[T]his court has stated that when...the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."

In this case, the defendants-appellants did not raise any constitutional issue in the trial court or Court of Appeals and, therefore, neither the trial court nor the Court of Appeals passed on any federal question. The first suggestion of any constitutional issue was in the defendants-appellant's Petition for Review to the Wisconsin Supreme Court. The Supreme Court refused to accept the case for review and, therefore, no Wisconsin court has addressed the constitutional issue raised by defendants-appellants.

Even assuming defendants-appellants have timely raised the constitutional

issue, they have not complied with the requirement that the issue be raised explicitly in the state court. Recently, in Webb v. Webb, (1981) 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392, the Supreme Court reiterated the explicitness requirement holding that the court will not accept jurisdiction unless an appellant has raised the constitutional issue in the state courts in such a way as to give the state courts the opportunity to adequately address the issue. The court stated the following at 101 S.Ct. 1889, 1892:

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system."

The Supreme Court refused to assume jurisdiction in Webb where, although the appellant did use the phrase "full faith

and credit" at several points in the state court proceeding, she did not cite the federal Constitition or any cases relying on the full faith and credit clause of the federal Constitition.

In this case, the only references to a constitutional issue in the defendants-appellants' Petition for Review to the Wisconsin Supreme Court are:

1. A reference to "due process" in the defendant-appellants' Petition for Review at the heading of one of the arguments (App. 4:1), and

2. Two references to the term "unconstitutional."

There is no reference to the United States Constitution. There is no reference to the Wisconsin Constitution. There is no reference to any case law which would apprise the Wisconsin Supreme

Court of the specific constitutional argument relied upon by defendants-appellants.

In short, defendants-appellants have failed to timely and explicitly raise any federal constitutional issue and the United States Supreme Court should, therefore, deny jurisdiction.

B. THE WISCONSIN COURT OF APPEALS' DECISION RESTS UPON AN ADEQUATE NON-FEDERAL BASIS.

Not only have the defendants-appellants failed to explicitly and timely raise a federal constitutional issue, the Wisconsin Court of Appeals' Decision rests upon a well-reasoned non-federal basis. Inasmuch as the Court of Appeals' Decision does not rest upon a federal ground, the United States Supreme Court does not have jurisdiction. Cramp v. Board of Public

Instruction of Orange County, Florida, (1961) 368 U.S. 278, 82 S.Ct. 275, 7 L.ed 2d 285.

Although the appointment of a conservator pursuant to §880.31, Wis. Stats., shall not be evidence of the incompetency of the person whose estate is being administered, the clear purpose of the statute is to provide court protection to those who are unable to properly manage their property or income without the stigma of incompetency. Estate of Evans, (1965) 28 Wis.2d 97, 100, 135 N.W.2d 832. It certainly makes no sense to have a conservatorship unless the court having jurisdiction over the conservatorship affords the conservatee some degree of protection. At the very least, that protection contemplates the conservatee and conservator conferring prior to making a gift so that the conservatee has a

thorough understanding of his or her financial condition and the effect the gift could have on the estate.

In most instances, once a conservatorship has been established, the conservator will have a much better understanding of the condition of the conservatee's estate than the conservatee and, therefore, will be in a better position to determine whether the conservatee can afford to make the contemplated gift.

The purpose of having court approval of a gift is to ensure that the conservatee is being protected by being properly advised and informed by the conservator prior to the gift being made. Unlike a legacy, a gift can have serious consequences on the conservatee at the time the gift is made. If the conservatee is to be protected by the court, it is essential that the court

having jurisdiction over the conservatorship be assured that the conservatee has been properly advised by the conservator of the consequences of the gift, and that the conservatee is in a position to make the gift.

Without the necessity of court approval of gifts, conservatees would be free to make gifts without the knowledge of the conservator or the court, regardless of whether the conservatee has a thorough understanding of his or her financial condition and the effect the gift would have on the estate.

Contrary to the statements made in defendants-appellant's Jurisdictional Statement, those who witnessed the March 9, 1982, transaction did not discuss thoroughly with Lillian Zobel the effect the gift would have on her estate and her future. The Hancoxes' primary concern was that Lillian Zobel be

allowed to remain in the hospital, as opposed to a nursing home, as long as she so wished, and they were concerned that the making of a substantial gift could well have an effect on her ability to remain in the hospital (42/14, 24, 370). It may well be that Lillian Zobel understood that she was giving away property with a value in the area of $50,000; however, that is not to say that Lillian Zobel understood how the transaction would affect her life in the immediate future. There was no evidence that the transaction was made with a thorough understanding of the extent of her estate and with an understanding of how the transaction was going to affect her. The evidence was undisputed that those who were in the best position to advise her as to the possible consequences of the gift, i.e., the

conservators, were not consulted prior to the transaction.

While the facts in the Evans case differ from those in this case, the Evans' decision suggests that a conservatee must have approval of the conservator and/or the court prior to making a gift. After discussing the purpose of the conservatorship statute, the court indicated that inasmuch as the conservatee is not completely incapable of looking after his own property:

> "...it makes no sense to allow the conservatee the freedom to direct a gift of his property where both the conservator and the court, as here, entered no objection." Evans, 135 N.W.2d, at 834 (Emphasis Added).

The court also stated that the conservatorship statute:

> "...does not prevent the conservator with its and the court's approval from making a transfer such as the creation of the joint tenancies sought by the conservatee, Evans, in the instant case." Evans, 135 N.W.2d, at 834 (Emphasis Added).

As the Court of Appeals indicated in its Decision (App. 1:21, 22), the protection afforded by the court in a conservatorship would be nullified without the necessity of prior court approval of gifts:

> "If a conservatee does not require the input and approval of the conservator or the conservatorship court in matters relating to the disposition of his or her property, a conservatorship serves no meaningful purpose...
>
> For us to hold that a conservatee may act at his or her whim without conservator or conservatorship court approval would emasculate the statute and render it meaningless."

C. THE DEFENDANTS-APPELLANTS DO NOT HAVE STANDING TO RAISE THE CONSTITUTIONAL ISSUE ASSERTED IN THE JURISDICTIONAL STATEMENT.

One of the requirements of standing is that the appellant must assert his

own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. Robert Warth v. Ira Seldin, (1975) 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343.

In this case, the defendants-appellants challenged the Wisconsin Court of Appeals' interpretation of the Wisconsin conservatorship statute, §880.31, Wis.Stats. The statute and the Wisconsin Court of Appeal's Decision address only the rights of a conservatee. Neither the statute nor the Decision address the rights of a donee. Although the defendants-appellants have couched the constitutional issue in the Jurisdictional Statement in language suggesting an infringement of the rights of a conservatee and a donee, in the final analysis the defendants-appellants are challenging the requirement that a

conservatee obtain conservator or court approval of a gift. The defendants-appellants claim such a restriction is an unconstitutional infringement on a conservatee's right to dispose of property (See Jurisdictional Statement P. 11). Thus, the defendants-appellants rest their claim for relief on the legal rights of the conservatee and, therefore, do not have the requisite standing to raise the constitutional issue set forth in the Jurisdictional Statement.

CONCLUSION

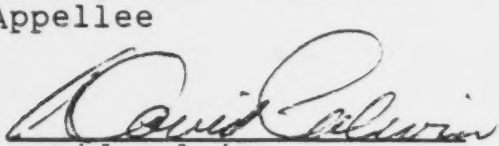
For the above reasons, the plaintiff-appellee respectfully submits that the United States Supreme Court affirm the decisions of the Wisconsin Court of Appeals and Wisconsin Supreme

Court, or in the alternative, dismiss the appeal and Petition for Certiorari.

Dated this 13th day of August, 1986.

Respectfully sumbitted,

COLWIN, FORTUNE, COLWIN,
POMEROY & ENGLISH, S.C.
Attorneys for Plaintiff-
Appellee

By 
David Colwin

201 South Marr Street
P. O. Box 1476
Fond du Lac, WI 54935
(414) 921-5770

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STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

LILLIAN ZOBEL, by Herbert Z. Hancox and Helen W. Hancox, her guardians,

Plaintiff-Appellant,

v.

DECISION of November 20, 1985 No. 84-1539

LEE FENENDAEL and GLORIA FENENDAEL, his wife,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Fond du Lac county: JOHN P. McGALLOWAY, JR., Judge.

Reversed and cause remanded.

Before Scott, C.J., Brown, P.J., and Nettesheim, J.

NETTESHEIM, J. Herbert and Helen Hancox, guardians of Lillian Zobel, appeal from a judgment entered following a jury trial dismissing their complaint which sought to void a gift by deed executed by Zobel to Lee and Gloria Fenendael. The jury determined that

Zobel was competent at the time she made the gift.

During trial, the Hancoxes sought to amend their complaint to conform to certain evidence which showed that Zobel executed the deed while she was subject to a conservatorship. The Hancoxes claimed that Zobel's gift was void, as a matter of law, since it was made without the approval of the conservator or conservatorship court. The trial court denied the motion to amend the pleadings. We conclude the denial of the motion was an abuse of discretion since no surprise or prejudice to the Fenendaels is demonstrated. We also conclude, as a matter of law, that a conservatee lacks the capacity to make a gift without the approval of the conservator or the conservatorship court. Therefore, we reverse and remand with instructions to allow amendment to

the pleadings and to enter judgment in favor of the Hancoxes.

On December 20, 1979, Lillian Zobel sold her house on a land contract to the Fenendaels. In November, 1981, Zobel petitioned the circuit court for the appointment of a conservator of her estate. The conservatorship court appointed the Hancoxes as conservators of Zobel's estate. After the appointment of the Hancoxes, Zobel decided that she wanted to forgive the balance of the land contract and gift her house to Gloria Fenendael. In March, 1982, Zobel executed a deed to the Fenendaels in satisfaction of the balance of the land contract. She did not inform the Hancoxes or the conservatorship court of the pending transaction nor seek their approval of the gift. [1]

The amended complaint upon which the jury trial was conducted alleged that

Zobel was not competent to make the gift by deed in March 1982. [2] Based upon these allegations, the Hancoxes sought foreclosure of the land contract. During the course of the Hancoxes' case-in-chief, testimony and documentary evidence established that Zobel was subject to the conservatorship at the time she executed the March 1982 deed in satisfaction of the land contract.

At the close of the Hancoxes' case, the trial court judicially noticed the conservatorship and guardianship file regarding Zobel. The Hancoxes moved for leave to amend their pleadings to include "the defense that the gift was not approved either by the conservator or the court." [3] Based upon this amendment, the Hancoxes then requested judgment as a matter of law contending that Zobel, as a conservatee, lacked the capacity to make a gift. The trial court took the motions

under advisement and stated that it would proceed to take a verdict.

At the close of the evidence, the Hancoxes again moved to amend their amended complaint to conform to the evidence and for judgment. The trial court again deferred ruling on the motions until a verdict was obtained. By decision on motions after verdict, the trial court denied the motion to amend the pleadings. The trial court's decision also, however, determined that the approval of the conservator or the conservatorship court was not required to render Zobel's gift effective. [4]

The Fenendaels rely upon sec. 802.06(2) and (4), Stats., which provides, in part:

> (2) Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim shall be asserted in the

> responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion ....
>
> (4) The defenses specifically listed in sub. (2), whether made in a pleading or by motion, . . . shall be heard and determined before trial on motion of any party, unless the judge to whom the case has been assigned orders that the hearing and determination thereof be deferred until the trial. [Emphasis added.]

This statute, however, does not apply to complaints. It is limited, on its face, to defenses asserted in a responsive pleading. Therefore, the Fenendaels' reliance on this statute and the related line of cases they cite is misplaced. [5]

Rather, the governing statute is sec. 802.09(2), Stats. The most complete discussion and analysis of this statute is contained in State v. Peterson, 104 Wis. 2d 616, 312 N.W.2d 784 (1981). Peterson bifurcates the statute into two parts governing two different fact

situations. The first addresses a situation where the issues are tried by the express or implied consent of the parties:

> AMENDMENTS TO CONFORM TO THE EVIDENCE. If issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues ....

Sec. 802.09(2). This part of the statute appears to be mandatory; if the trial court concludes that the parties consented to the trial of the issues, the court must conform the pleadings to the proof. Peterson at 629, 312 N.W.2d at 790.

The second addresses a situation where an objection is made at trial that

the evidence offered is not within the issues raised by the pleadings. Id.

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objection party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Sec. 802.09(2), Stats. When objection is made, the statute grants the court discretion to allow the amendment and encourages the court "to do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining the ... defense upon the merits." Peterson

at 629-30, 312 N.W.2d at 790-91.

Our reading of the entire record in this case reveals that the existence of the conservatorship was alluded to scores of times without objection. Documentary evidence establishing the existence of the conservatorship was stipulated into evidence. At various stages in the proceedings, the Fenendaels themselves put in evidence concerning the conservatorship. The record reveals, by our court, seventeen references to the conservatorship by either the Hancoxes or the Fenendaels before the Fenendaels objected on the relevancy and pleading grounds asserted on this appeal. Under these circumstances, we conclude that the Fenendaels did not timely object to the proofs submitted. Therefore, we analyze the issue on the motion to amend the pleadings as one governed by the first portion of sec. 802.09(2), Stats. This

requires us to determine whether the issues relating to the conservatorship were tried by the express or implied consent of the parties.

Here, there was no express consent.[6] Thus, if the Fenendaels consented to trial of the conservatorship issues, the consent must be implied.

Whether an issue has been tried by implied consent is to be determined by the circuit court; the circuit court must make findings on the issue of consent, because once consent is found, the circuit court has no choice but to amend the pleadings. Peterson at 631, 312 N.W.2d at 791. Here, the circuit court did not make any findings that there was -- or was not -- implied consent. We are thus faced with the issue of whether we can on the basis of the record before us determine whether, as a matter of law, the Fenendaels understood, were aware of,

or had actual notice that the issue of Zobel's legal capacity as a conservatee was being raised by the evidence concerning the conservatorship. See id.

Implied consent is generally held to exist where there is no objection to the introduction of evidence on the unpleaded issue and where the party not objecting is aware that the evidence goes to the unpleaded issue; actual notice to the parties appears to be the key factor in determining whether there was implied consent. Id. at 630, 312 N.W.2d at 791. As noted above, the evidence concerning the conservatorship was admitted without timely objection. The more difficult question is whether the Fenendaels were aware that the conservatorship evidence went to the issue of Zobel's capacity to make a gift -- an unpleaded issue. In order to find implied consent, it must appear that the

parties understood the evidence was aimed at the unpleaded issue. Id. Because the evidence on the conservatorship issues was also relevant to the issue of Zobel's competency, the Fenendaels may not have been aware that the Hancoxes were raising a new unpleaded issue. Thus, we cannot conclude, as a matter of law, that the Fenendaels had actual notice that the evidence concerning the conservatorship went to the unpleaded issue. Therefore, the Fenendaels did not impliedly consent to the trial of such issue.

Our analysis does not stop at this point, however. This is because Peterson engrafts upon sec. 802.09(2), Stats., an "interests of justice" determination even after a finding that no implied consent to the trial of the unpleaded issue existed.

> If the evidence has been introduced without objection and the circuit court finds

> that there has been no actual notice, it should find that there has been no implied consent of the unpleaded issue. Under such circumstances, the circuit court may sua sponte under sec. 802.09(1), (2) amend the pleadings to conform to the evidence if the circuit court concludes that justice so requires. Amendment is thus within the discretion of the circuit court and the circuit court in exercising its discretion must balance the interests of the party benefiting by the amendment and those of the party objecting to the amendment.

Id. at 634, 312 N.W.2d at 793 (emphasis added). This "interests of justice" consideration is, essentially, a determination of prejudice. See id. at 635, 312 N.W.2d at 793. [7]

Although the supreme court in Peterson did not expressly state that the determination of prejudice in this context presents a question of law, we conclude that it does. We do so not only because the supreme court in Peterson

proceeded to address the question, but also because prejudice, in other contexts, has been held to present a mixed question of law and fact. State v. Pitsch, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711, 714-15 (1985).

Here, the historical facts relating to the question of prejudice are undisputed. Thus, we are left with only the legal question as to whether prejudice exists. This court is not bound by a trial court finding based on undisputed evidentiary facts when the finding is essentially a conclusion of law. Oshkosh Northwestern Co. v. Oshkosh Library Board, 125 Wis. 2d 480, 485, 373 N.W.2d 459, 462 (Ct. App. 1985).

The trial court concluded that permitting the amendment to the complaint would prejudice the Fenendaels. However, the trial court did not specify in what respects such prejudice existed. [8] Upon

appeal, the Fenendaels opine that the granting of the motion would have prompted a need to present evidence establishing the "selfish motivation of the Hancoxes and Lillian Zobel's personal motives in going ahead with the transaction before telling the Hancoxes." But such testimony would have no bearing on the legal question of the capacity of a conservatee to make a gift without conservator or conservatorship court approval. The same holds true for the Fenendaels' claim that "the testimony of the judge in the conservatorship proceedings might have been presented." [9]

The amendment to the pleadings would simply have placed before the trial court the underlying legal question presented on this appeal as to whether a conservatee may make a gift of her property without approval of the conservator or her conservatorship

court. No prejudice is shown (and we can fathom none) by the granting of the amendment. The existence of the conservatorship was acknowledged by all parties. Its presence raised a legitimate legal question which the trial court addressed in its ruling on the motion for judgment notwithstanding the verdict. When the facts pertaining to the conservatorship were repeatedly addressed at trial without timely objection, we are at a loss to perceive any prejudice by granting a motion to amend the pleadings to conform to such evidence. [10]

Statutes governing amendment of pleadings are to be liberally construed to permit the presentation of the entire controversy providing such amendment does not unfairly deprive the opposing party of an opportunity to meet the new issue. Gustavson v. O'Brien, 87 Wis. 2d

193, 204, 274 N.W.2d 627, 633 (1979); Wipfli v. Martin, 34 Wis. 2d 169, 174, 148 N.W.2d 674, 677 (1967). Here, we do not see the requested amendment to the pleadings as unfairly depriving the Fenendaels of the opportunity to meet the relevant factual and legal issues presented by Zobel's status as a conservatee. Indeed, the trial court decision points to no such specific prejudice. Under these circumstances, the interests of justice required the granting of the amendment to the pleadings, despite the lack of actual notice to the Fenendaels. Peterson at 634, 312 N.W.2d at 793.

We now turn to the legal issue presented by the amendment to the complaint: Whether a conservatee requires the approval of either the conservator or the conservatorship court in order to make an effective gift of her

property. [11] We conclude she does.

Section 880.31, Stats., provides for the appointment of a conservator of a person's estate when that person "believes that he or she is unable properly to manage his or her property or income." The purpose of the conservatorship statute was "to eliminate the stigma of incompetency for persons who are forgetful because of age, and yet afford them the protection of the court if they desired it." Estate of Evans, 28 Wis. 2d 97, 100, 135 N.W.2d 832, 834 (1965), quoting Kroncke, A Decade of Probate Law, 1961 Wis. L. Rev. 82, 118. The process is voluntary, and the personal appointment of a conservator is not evidence of the competency or incompetency of the person whose estate is under the conservatorship. Sec. 880.31(6). A conservator has all of the powers and duties of a guardian of the

property of an incompetent person. Sec. 880.31(3). Section 880.31, however, does not address the power or capacity of a conservatee to dispose of his or her property.

Evans determined that a conservator had the authority to create a joint tenancy in certain of the conservatorship property when the transfer was sought by the conservatee and when approved by the conservatorship court. The Hancoxes argue that certain supreme court language in Evans always requires approval of the conservator or the conservatorship court before a conservatee can effectively act. "[I]n a conservatorship, where there is no adjudication that the applicant is incompetent, It makes sense to allow the conservatee the freedom to direct a gift of his property where both the conservator and the court, as here, entered no objection." Evans at 101, 135

N.W.2d at 834 (emphasis added). However, the facts in Evans are quite different from those here. In Evans, the conservator was directed to transfer the conservatee's property pursuant to the conservatee's petition and the conservatorship court's order. Here, the conservatee did not seek the prior approval of either the conservator or the conservatorship court. In fact, she expressly sought to circumvent both. In our certification to the Wisconsin Supreme Court we asked whether the intent of the Evans language was to require conservator or conservatorship court approval in all instances.

Although the appointment of a conservator is not evidence of the incompetency of the conservatee, and although a conservatee is not considered completely incapable of looking after his or her own property (Evans at 100), the

purpose of a conservatorship is to afford the protections akin to those provided by a guardianship but without the stigma of incompetency. See Evans at 100, 135 N.W.2d at 834. If a conservatee does not require the input and approval of the conservator or the conservatorship court in matters relating to the disposition of his or her property, a conservatorship serves no meaningful purpose.

If a conservatee wishes to rid himself or herself of the restrictions of a conservatorship, the statute supplies an avenue for relief.

> 880.31(4) Any person whose estate is under conservatorship may apply to the court at any time for termination thereof. Upon such application, the court shall fix a time and place for hearing and direct that 10 days' notice by mail be given to the person's guardian, if any, the conservator and the presumptive heirs of the applicant. Upon such hearing, the court shall, unless it is clearly shown that the applicant is incompetent,

> remove the conservator and order the property restored to the applicant, or if the applicant so desires and the nominee is suitable, the court may appoint a successor conservator.

We acknowledge that invalidating Zobel's gift is a harsh result under the facts of this case where she has been found to be competent at the time of the gift. However, for us to hold that a conservatee may act at his or her whim without conservator or conservatorship court approval would emasculate the statute and render it meaningless. Such interpretations are to be avoided. See Johnson v. State, 76 Wis. 2d 672, 676, 251 N.W.2d 834, 836 (1977). [12]

We therefore reverse and remand this matter to the trial court with directions to grant the Hancoxes' motion to amend the complaint to conform to the evidence and to enter judgment upon the second amended complaint in favor of the

Hancoxes.

By the Court. -- Judgment reversed and cause remanded. [13]

Recommended for publication in the official reports.

APPENDIX

[1] It was only after these events that the Hancoxes were appointed Zobel's guardians.

[2] The amended complaint also challenged Zobel's competency to make a September 1981 amendment to the original land contract. This amendment predated the conservatorship. The jury found Zobel to be competent at the time she signed this amendment. This finding is not challenged upon this appeal.

The amended complaint also raised a claim of undue influence. This, however, was withdrawn at the close of the Hancoxes' case.

The parties agree that the jury issue of Zobel's competency goes to the question of her mental state and does not address the question of her "capacity" to make a gift while subject to a conservatorship.

[3] Technically, this was not a motion to amend to conform to the evidence under sec. 802.09(2), Stats., since the Hancoxes based their motion upon sec. 802.09(1) and (4). However, no prejudice is demonstrated by this failure to refer to the correct subsection since the Hancoxes' attorney indicated that his motion was to amend the pleadings to include the evidentiary references to the conservatorship. In addition, the reference to a "defense" was technically inaccurate since the Hancoxes' pleading was a complaint.

[4] This ruling was made in response to the Hancoxes' motion for judgment

notwithstanding the verdict. Thus, the trial court, despite denying the motion to amend the pleadings, nevertheless reached the legal issue of whether a conservatee could make an effective gift under these circumstances. However, upon appeal, neither party argues that the trial court's judgment notwithstanding the verdict ruling moots the issue concerning the amendment of the pleadings. Nor does either party address the interaction between the two procedural statutes. We choose therefore to address this case on the issue raised and briefed by the parties -- the propriety of the trial court's denial of the motion to amend the pleadings.

[5] Gustavson v. O'Brien, 87 Wis. 2d 193, 274 N.W.2d 627 (1979); Figgs v. City of Milwaukee, 121 Wis. 2d 44, 357 N.W.2d 548 (1984); Fond du Lac Skyport, Inc. v. Moraine Airways, Inc., 67 Wis. 2d 109, 226 N.W.2d 428 (1975); Poehling v. La Crosse Plumbing Supply Co., 24 Wis. 2d 239, 128 N.W.2d 419 (1964); Metropolitan Sewerage District v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 69 Wis. 2d 387, 230 N.W.2d 651 (1975).

[6] Express consent may be given by stipulation, or may be incorporated in a pretrial order and rarely raises any serious fact question. State v. Peterson, 104 Wis. 2d 616, 630 n. 17, 312 N.W.2d 784, 791 (1981). See also 6 C. Wright and A. Miller, Federal Practice and Procedure - Civil § 1493, at 461-62 (1971).

[7] Peterson applied the prejudice determination in a situation where the court had acted sua sponte to amend the

complaint to conform to the evidence. Id. at 634, 312 N.W.2d at 793. We see no reason to fashion a different rule in a case such as this where as party has moved to amend a complaint to conform to the evidence. Were we to limit Peterson to only those cases where the court has acted sua sponte, a party who does not move to amend a complaint would receive the benefit of a prejudice determination, whereas a party who place the issue before the court would be denied this determination. This would result in an uneven and unreasonable application of the statute. Such an application is to be avoided. See State Central Credit Union v. Bigus, 101 Wis. 2d 237, 242, 304 N.W.2d 148, 150-51 (Ct. App. 1981). Moreover, when the supreme court fashioned the balancing test in Peterson, it was interpreting sec. 802.09(2), Stats., which contemplates a motion made by a party -- not the court.

[8] The trial court's finding of "prejudice" to the Fenendaels is actually more akin to a finding of laches against the Hancoxes. While a consideration of laches is certainly appropriate in this "balancing of interest proceeding," laches does not necessarily equate with prejudice.

[9] This gratuitously assumes that such testimony is admissible.

[10] The cases relied upon by the Fenendaels are inapposite. Figgs v. City of Milwaukee, 121 Wis. 2d 44, 357 N.W.2d 548 (1984), and its language relating to certain "tactics" on the part of the city attorney smack more of estoppel than prejudice. Moreover, the language is

dicta to the rule of the case which holds that the notice of claim given by the plaintiff was sufficient. It was upon this latter issue that he supreme court reversed the court of appeals -- not any finding or conclusion relating to the conduct of the city attorney.

Fond du Lac Skyport, Inc. v. Moraine Airways, Inc., 67 Wis. 2d 109, 226 N.W.2d 428 (1975), also does not apply since the issue raised by the defendant upon appeal was not raised in his responsive pleadings.

Poehling v. La Crosse Plumbing Supply Co., 24 Wis. 2d 239, 128 N.W.2d 419 (1964), was a summary judgment case in which the trial court rejected a proposed amended answer. Thus, Poehling is only a pleading case and decided only on the pleadings in which the defendant claimed a right to try its defenses seriatim; first by demurrer, then by a plea in abatement, and finally by an answer on the merits. Poehling is not an amendment of pleadings to conform to the evidence case.

The same is true for Trispel v. Haefer, 89 Wis. 2d 725, 279 N.W.2d 242 (1979), where the issue was whether a party should be permitted to amend its pleading for a third time after a failure with a pretrial order, despite a specific warning of a potential dismissal motion prompted by the party's questionable allegations in its original and amended complaints.

Metropolitan Sewerage District v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 69 Wis. 2d 387, 230 N.W.2d

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651 (1975), and Drehmel v. Radant, 75 Wis. 2d 223, 249 N.W.2d 274 (1977), are cases where the trial court found specific prejudice to the party against whom the motion was made and where wholly unrelated and new issues were injected into a proceeding. Metropolitan Sewerage District also dealt with a responsive pleading.

[11] We certified this issue to the Wisconsin Supreme Court on August 14, 1985. Certification was denied on October 8, 1985.

[12] The Fenendaels note that under a limited guardianship, a ward may be allowed to hold or convey property and to enter into contracts. See sec. 880.33(3), Stats. They argue that it would be anomalous for the law to accord some respect for the unsupervised legal actions of an incompetent, but give none to a conservatee who is presumed competent. We acknowledge the anomaly but point out that this is an inconsistency more properly corrected by legislative, rather than judicial, action.

[13] We are aware that Peterson, having concluded that no prejudice inured to the defendant by virtue of the trial court amendment to the complaint, nonetheless remanded the case "to offer the parties an opportunity to submit additional evidence to ensure that the parties have a full opportunity to be heard on the issues litigated." Id. at 640, 312 N.W.2d at 795. Here, however, the Fenendaels have proffered to us the suggested evidence which they claim would have been offered in response to the

unpleaded issue. We have previously determined herein that such evidence is not relevant to the legal question presented by the requested amendment. In addition, we have attempted to discern other possible evidentiary material not suggested by the Fenendaels that could conceivably be relevant to this issue. We have discerned none.

Finally, this case was tried to a jury whereas Peterson was a trial to the court. Remand here for further evidentiary proceedings is impossible since the jury has been discharged.

IN COURT OF APPEALS OF WISCONSIN
DISTRICT II

LILLIAN ZOBEL, by Herbert Z. Hancox and Helen W. Hancox, her guardians,

Plaintiff-Appellant,

v.

CERTIFICATION of August 14, 1985
No. 84-1539

LEE FENENDAEL and GLORIA FENENDAEL, his wife,

Defendants-Respondents.

Before Scott, C.J., Brown, P.J., and Nettesheim, J.

Pursuant to Rule 809.61, Stats., this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

May a conservatee make a gift of his or her property without the approval of the conservator or the court which ordered the appointment of the conservator?

FACTS

In November, 1981, Lillian Zobel petitioned the circuit court for the appointment of a conservator of her estate. The court appointed the appellants, Herbert and Helen Hancox as conservators of Zobel's estate. Prior to petitioning the court for the appointment of conservators, Zobel had sold her house on a land contract to the respondent, Gloria and Lee Fenendael. After the appointment of the Hancoxes, Zobel decided that she wanted to forgive the balance of the land contract and gift her house to Gloria Fenendael. In March 1982, Zobel executed a deed in satisfaction of the land contract. Zobel did not inform the Hancoxes or he court of the pending transaction nor seek their approval prior to the execution of the deed.

The conservators, in an action to declare the deed void, claimed that Zobel, as a conservatee, lacked the capacity to make the gift without the approval of the conservators and/or the court. The trial court held that such approval was not necessary.

DISCUSSION

Section 880.31, Stats., provides for the appointment of a conservator of a person's estate when that person "believes that he or she is unable properly to manage his or her property or income." The purpose of the conservatorship statute was "to eliminate the stigma of incompetency for persons who are forgetful because of age, and yet afford them the protection of the court if they desired it." Estate of Evans, 28 Wis. 2d 97, 100, 135 N.W.2d 832, 834 (1965), quoting Kroncke, A Decade of Probate Law, 1961 Wis. L. Rev. 82, 118.

The process is voluntary, and the personal appointment of a conservator is not evidence of the competency or incompetency of the person whose estate is under the conservatorship. Sec. 880.31(6). A conservator has all of the powers and duties of a guardian of the property of an incompetent person. Sec. 880.31(3). Section 880.31 does not address the power or capacity of a conservatee to dispose of his or her property.

Here, the conservators rely on Evans to support their contention that a gift by a conservatee must have the approval of the conservators and the court. The question addressed in Evans, however, was "whether the trial court erred in authorizing the conservator to place the treasury notes owned by [the conservatee] in joint tenancy with others." Evans at 99, 135 N.W.2d at 833. The issue in

Evans, therefore, concerned the authority of the conservator to enter into a transaction and did not involve the authority of the conservatee to enter into transactions of dispose of property. Some language in Evans, however, suggests that the approval of the conservator and the court is necessary:

> Thus, a conservatee is not considered completely incapable of looking after his own property. A ward under guardianship is either a minor, incompetent, or a spendthrift. He is incapable of looking after his own property and it fits the statutory scheme for control of guardianships that the ward should not be able to control what should be done with his property. But in a conservatorship, where there is no adjudication that the applicant is incompetent, it makes sense to allow the conservatee freedom to direct a gift of his property where both the conservator and the court, as here, entered no objection.

Evans at 100-01, 135 N.W.2d at 834

(footnote omitted; emphasis added). Given that the issue here was not directly before the court in Evans, we are uncertain whether Evans requires the approval of the conservator or the court before the conservatee makes a gift.

Nevertheless, the argument of the conservators is persuasive. As they point out, a conservatee is under the protection of the court because he or she is not able to properly manage his or her property. If the approval of the conservator or the court is not necessary for the conservatee to make a gift of his or her property, then what purpose does the conservatorship serve? Is it a flexible relationship in which the conservatee may choose when he or she desires the protection of the conservatorship? If so, could not the purpose of the conservatorship be undermined and the relationship rendered largely meaningless?

On the other hand, the facts of this particular case present an equally convincing argument for allowing a conservatee to gift property as he or she desires without the approval of the conservator or the court. The appointment of a conservator is not evidence of a person's competence or incompetence. Sec. 880.31(6), Stats. In this action to declare the deed void, the issue of Zobel's competency was litigated and the jury determined that she was competent at the time she made the gift. In executing the deed, Zobel had the assistance of an attorney who testified that he was satisfied that Zobel knew what she was doing when she executed the deed. There is a strong evidentiary record of Zobel's mental competency to gift her house. Her reluctance to inform her conservators was because she anticipated their

disapproval. If this court accepts the argument of the conservators, we would undo the clear intent of Zobel as found by the jury and supported by the evidence. We are reluctant to do so.

We also note that under a limited guardianship, a ward may be allowed to hold or convey property and to enter into contracts. See sec. 880.33(3), Stats. It would appear anomolous for the law to accord some respect for the unsupervised legal actions of an incompetent under this statute, but give none to a conservatee who is presumed competent.

In conclusion, this court is uncertain a to the authority of a conservatee to dispose of his or her property. The statute provides little guidance and the case law is not particularly helpful. The supreme court should make the policy decision of whether the intent of the conservatee

ought to be the primary consideration, or whether the apparent Evans requirement that the conservator or the court approve of a gift ought to govern. We request, therefore, that the supreme court accept jurisdiction in this case.

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, April 8, 1986

To: Hon. John P. McGalloway, Jr.
Fond du Lac County Courthouse
Fond du Lac, WI 54935

David Colwin
Colwin, Fortune, Colwin,
Pomeroy & English, S.C.
P.O. Box 1476
Fond du Lac, WI 54935

Kenan J. Kersten
Kersten & McKinnon
231 W. Wisconsin Ave.,
Suite 1102
Milwaukee, WI 53203

The Court today announced an order in your case as follows:

No. 84-1539 Zobel v. Fenendael

The court having considered defendants-respondents-petitioners Lee and Gloria Fenendael's petition for review of an adverse decision of the court of appeals, district II, dated November 20, 1985,

IT IS ORDERED the petition for review is denied, with $50 costs to plaintiff-appellant Lillian Zobel.

Marilyn Graves
Clerk of Supreme Court

Portion of petition to Wisconsin Supreme Court to review. Referring to constitutional rights.

II. HOLDING THAT A CONSERVATEE IS LEGALLY PRECLUDED FROM GIFTING HER PROPERTY DEPRIVES A CONSERVATEE OF DUE PROCESS OF LAW FOR GIFTS MADE PRIOR TO THE EFFECTIVE DATE OF THAT HOLDING.

At the time of the gift (until the date of the court of appeals opinion) there was no existing Wisconsin law restricting the powers of a conservatee to dispose of property. (See Certification at 6). Without authority to the contrary, it is unconstitutional to deprive Lillian Zobel, as a matter of law, of the right to dispose of her own property in March of 1982 by an appellate decision rendered November 20, 1985. Denying review would result in a new pronouncement of law voiding an action which was valid at the time it occurred. Although the conservatorship statutes provide a mechanism whereby a transaction is voidable (dependent upon

the factual circumstance of competency), adherence to the court of appeals decision voids the transaction as a matter of law.

The only existing law pertaining to a conservatee's powers deals with factual competency, not legal competency. Section 880.31(6) expressly provides that a conservatorship "shall not be evidence of the competency or incompetency of the [conservatee]." Section 880.215 provides that a ward subject to a limited guardianship has the power to enter a valid contract and it will not be held void "unless the determination is made by the court in its finding under s. 880.33(3) that the ward is incapable of exercising the power to make contracts." It is clearly unconstitutional to permit an incompetent ward to convey and hold property in certain situations, yet preclude a

conservatee who has not had the benefit of a hearing regarding competency from gifting her own property.

This is particularly ironic in the case at bar where this legal issue was never raised until the close of the plaintiffs' case in chief and there was a three day trial where the mental incompetency was the sole issue at trial. A jury found that the conservatee was mentally competent and intended to gift her property to the Fenendaels and the trial judge entered judgment on that verdict. Considering the foregoing, the supreme court should not condone precedent which precludes, as a matter of law, a conservatee from conveying property when it has already been litigated and decided that she was mentally competent when she did so. As the court of appeals notes, it is not even remanding the matter to the trial

court for further findings or an additional evidentiary hearing where testimony from the conservatorship court can be presented. Opinion, n.13 at 21. It merely voids the transaction, reversing the judgment entered on the jury's verdict.

The court of appeals voids this finding of mental competency and creates a legal preclusion which did not exist at the time of the transaction. As the Wisconsin Supreme Court has recognized:

> There is a high place, in contemplation of the fundamental principles of civil life, which the right of individual liberty to dispose of one's property by contract or by will, - holds. It is not the business of courts to undo what an old person may have done with h[er] property because of judicial notions of propriety or moral obligations, in a case of this sort, where the wishes of relatives, however deserving. Did the [wo]man do freely what [s]he wanted to and was competent to decide upon? Those are the sole questions.

In re Estate of Bauer, 264 Wis. 556, 561, 59 N.W.2d 481 (1956)(quoting Boardman v. Lorentzen, 155 Wis. 566, 579, 145 N.W. 750 (1915)(emphasis supplied)). The court of appeals decision, creates law which is incongruous with the existing statutory law pertaining to conservatorships and guardianships and voids the clearly intended and competent act that Lillian Zobel took in March of 1982. This unwarranted deprivation of Lillian Zobel's constitutional rights, on an ex post facto basis, in and of itself warrants this court's review pursuant to Rule 809.62(1)(a).

III. WISCONSIN STATUTES SECTION 809.62(1)(d) APPLIES.

Although the issue of law determined by the supreme court in Estate of Evans related to the authority of a conservator, the court did state that "a conservatee is not considered completely

incapable of looking after his own property" (28 Wis. 2d at 100) and that it should not be necessary for a competent conservatee to terminate the conservatorship in order to consummate competently intended transactions. 28 Wis. 2d at 101. To the extent the court in Evans intended to keep the concept of conservatorship sufficiently flexible to permit the conservatee to act outside the conservatorship under certain circumstances, the court of appeals decision in this case conflicts with Evans. Since there is no controlling supreme court decision or Wisconsin statute requiring the court of appeals holding herein, the supreme court should review and decide this case to resolve that apparent conflict. If, as the court indicated in Evans, the concept of conservatorship is to be sufficiently flexible to recognize as valid acts of

conservatees in certain cases, this, under the undisputed record, is such a case. Rather than repeating the extensive evidentiary record reviewed in the statement of facts herein upon which Lillian Zobel was found at trial to have been competent at the time in question, it should suffice to cite the court of appeals' statement that "there is a strong evidentiary record of Zobel's mental competency to gift her house" (Certification at 5) and that "invalidating Zobel's gift is a harsh result under the facts of this case where she has been found to have been competent at the time of the gift" (Opinion at 16)(emphasis supplied).

CONSTITUTIONAL AND STAUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state capitols wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1 (emphasis supplied).

Wisconsin Constitution, Article I

Declaration of Rights

> Equality; inherent rights. Section 1. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to serve these rights,

governments are instituted, deriving their just powers from the consent of the governed.

Wis. Const. art. I, § 1.

Wisconsin's Conservatorship Statute

880.31 Voluntary Proceedings; Conservators

(1) Any adult resident who believes that he or she is unable properly to manage his or her property or income may voluntarily apply to the circuit court of the county of his or her residence for appointment of a conservator of the estate. Upon receipt of the application the court shall fix a time and place for hearing the application and direct to whom and in what manner notice of the hearing shall be given.

(2) At the time of such hearing the applicant shall be personally examined and if the court is satisfied that the applicant desires a conservator and that the fiduciary nominated is suitable, the court may appoint him as such and issue letters of conservatorship to him

upon the filing of a bond in the amount fixed by the court.

(3) A conservator shall have all the powers and duties of a guardian of the property of an incompetent person. The conservator's powers shall cease upon being removed by the court or upon death of the person whose estate is being conserved.

(4) Any person whose estate is under conservatorship may apply to the court at any time for termination thereof. Upon such application, the court shall fix a time and place for hearing and direct that 10 days' notice by mail be given to the person's guardian, if any, the conservator and the presumptive heirs of the applicant. Upon such hearing, the court shall, unless it is clearly shown that the applicant is incompetent, remove the conservator and order the property restored to the applicant, or if the applicant so desires and the nominee is suitable, the court may appoint a successor conservator.

(5) If the court shall upon such hearing

determine that the person whose estate is administered by a conservator may be incapable of handling his estate, the court shall order the conservatorship continued, or if the applicant so desires and the nominee is suitable, the court may appoint a successor conservator.

(6) Appointment of a conservator shall not be evidence of the competency or incompetency of the person whose estate is being administered.

(7) If an application for conservatorship is filed, the fee prescribed in s. 814.66(1)(b) shall be paid at the time of the filing of the inventory or other documents setting forth the value of the estate.

Wis. Stats. § 880.31 (emphasis supplied).